STATE OF MICHIGAN

COURT OF APPEALS

NANCY FULGENZIE, Plaintiff/Counterdefendant-Appellee,	UNPUBLISHED March 10, 2005
v	No. 251032 Mackinac Circuit Court
KENNETH W. WARNER and SHIRLEY S. WARNER, Defendants/Counterplaintiffs-Appellants.	LC No. 02-005462-CH

Before: Talbot, P.J., Whitbeck, C.J., and Jansen, J.

PER CURIAM.

Defendants Kenneth and Shirley Warner appeal as of right the trial court's grant of an easement over their property to plaintiff Nancy Fulgenzie. We affirm. We decide this case without oral argument pursuant to MCR 7.214(E).

I. Basic Facts And Procedural History

Fulgenzie and the Warners own adjacent commercial properties along business loop I-75 in St. Ignace. Fulgenzie owns Frank's Store, a convenience store and gas station, and the Warners own the Rockview Motel. Their dispute concerns a driveway that leads to the businesses' parking lots, a driveway that Fulgenzie and her predecessors and their customers have used to access the store for twenty-seven years. Both properties were owned by Carl Mortensen until 1976, when he sold the store to John Laver. Laver sold the store to Frank Sorrels in 1987, and Fulgenzie bought it from Sorrels in 2002.

Following a bench trial, the trial court held that Fulgenzie had a permanent easement by implied grant on a portion of the Warners' property to provide access to Fulgenzie's business. The trial court found that the easement was reasonably necessary, explaining:

> Both Mr. Sorrels and Mr. Laver testified that it would not be possible to operate the store as a combination gas station and convenience store without the use of the north driveway over defendants' property. They testified because of the lot size, without the northern access to I-75, all vehicles, including delivery trucks, could not reasonably use the parking lot because motorists would have to

back up after making purchases or delivering products in order to exit the lot. Mr. Sorrels also testified that if he were to remove the gas pumps, the value of his business would be substantially reduced. The pumps generate 300,000 gallons of gas in yearly sales with a profit of between seven (7) and eleven (11) cents per gallon, or $21,000 to $33,000 dollars of profit.

Based on those facts, the trial court found that Fulgenzie established a necessity for the easement "without which her property would not be suitable for the purposes for which it was purchased."

II. Implied Easement

A. Standard Of Review

We review de novo equitable actions while reviewing the factual findings supporting the decision for clear error.[1]

B. Determining Whether Easement Is "Reasonably Necessary"

A party asserting an implied easement must show "(1) that during the unity of title an apparently permanent and obvious servitude was imposed on one part of an estate in favor of another, (2) continuity, and (3) that the easement is reasonably necessary for the fair enjoyment of the property it benefits."[2]

The first element requires that the easement be apparent at the time of severance.[3] On appeal, the Warners essentially argue that an easement must be reasonably necessary at the time of severance. According to the Warners, if the easement is not reasonably necessary at that time, then the easement is also not apparent. The Warners argue that the reasonable necessity for the easement in this case did not arise until 1991, when Fulgenzie's predecessor in interest moved the gas pumps from one location on the store's property to another. The Warners rely on the testimony of Frank Sorrels, who owned the store from 1987 to 2002, when he sold it to Fulgenzie:

> Q. If you had left the pump location where they were before would you have difficulty getting in?
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> A. No, there probably wouldn't be an existing business because there was only one pump with access to one side, that's the old time mom and pop store you would have.

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[1] *Webb v Smith (After Second Remand)*, 224 Mich App 203, 210; 568 NW2d 378 (1997).

[2] *Schmidt v Eger*, 94 Mich App 728, 731; 289 NW2d 851 (1980).

[3] *Id*. at 736.

Q. If you eliminate the gas pumps and just have a party store you wouldn't have the difficulty we have been talking about as far as cars go, trucks continuing to still visit the premises?

A. That is true. Of course, business would be down also.

The Warners' legal argument that reasonable necessity must exist at the time of severance finds support in *Harrison v Heald*[4] and *Rannels v Marx*,[5] which both include the following quotation:

> Where, during unity of title, an apparently permanent and obvious servitude is imposed on one part of the estate in favor of another, *which at the time of the severance is in use, and is reasonably necessary for the fair enjoyment of the other*, then, upon a severance of such ownership, whether by voluntary alienation or by judicial proceedings, there arises by implication of law a grant or reservation of the right to continue such use. In such case the law implies that with the grant of the one an easement is also granted or reserved, as the case may be, in the other, subjecting it to the burden of all such visible uses and incidents as are reasonably necessary to the enjoyment of the dominant heritage in substantially the same condition in which it appeared and was used when the grant was made.[6]

Even if the Warners are correct that reasonable necessity must exist at the time of severance, however, the Warners' reliance on Sorrels' testimony is misplaced. Sorrels did not own the store until 1987, over a decade after severance occurred in 1976, when the Mortensons sold the store to John Laver.[7] Thus, the pertinent testimony regarding necessity at the time of severance is that of Laver, not Sorrels. Laver testified that it would be difficult to conduct store business without the use of the driveway because large vehicles such as delivery trucks and motor homes, the latter of which comprised a growing share of his clientele, could not get in and out of his parking lot without backing onto the business loop of the expressway. In light of Laver's testimony, the trial court's determination that the easement was reasonably necessary at the time of severance was not clearly erroneous.

The Warners also argue that if this Court determines that reasonable necessity concerns circumstances other than at the time of severance, there was insufficient proof of reasonable necessity here because Fulgenzie did not present proof other than "lay opinion evidence" concerning "the inefficiencies of conducting business without the ability to transverse the clear length of the property of the [the Warners.]" The Warners note that in *Schmidt*, the plaintiffs

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[4] *Harrison v Heald*, 360 Mich 203; 103 NW2d 348 (1960).

[5] *Rannels v Marx*, 357 Mich 453; 98 NW2d 583 (1959).

[6] *Harrison*, *supra* at 207; *Rannels*, *supra* at 456 (citations and internal quotation marks omitted; emphasis changed).

[7] See *Schmidt*, *supra* at 737.

presented proof of the cost to put in a new drainage system, but in this case Fulgenzie did not present proof of the cost of alternatives for the store if access to the disputed driveway were closed.

We find the Warners' argument unpersuasive. *Schmidt* does not hold that expert testimony or the cost of alternative plans is mandatory to satisfy the burden of proof, and the Supreme Court did not refer to that type of testimony in *Rannels* or *Harrison*. We conclude that the evidence at trial, albeit lay opinion testimony, supports the trial court's finding that use of the driveway on the Warners' property was reasonably necessary to the continued operation of Fulgenzie's business.

Affirmed.

/s/ Michael J. Talbot
/s/ William C. Whitbeck
/s/ Kathleen Jansen